

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MARK AND ANNA RUSZCZYNSKI</b>	:	ORDER
	:	DTA NO. 818572
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Years 1995 and	:	
1996.	:	

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Petitioners, Mark and Anna Ruszczyński,<sup>1</sup> 34 Hillside Avenue, Apt. 2AA, New York, New York 10040, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1995 and 1996.

On September 21, 2001, the Division of Taxation, by its representative Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel), brought a motion for summary determination pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the grounds that the Division of Tax Appeals lacks jurisdiction to consider the merits of this proceeding by reason of the failure of petitioners to file a petition within 90 days of the date of mailing of the conciliation order. Petitioners, appearing *pro se*, did not respond to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this order

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<sup>1</sup> Mr. Ruszczyński's name appears as Mark in the petition and correspondence sent by petitioners to the Division of Taxation. His first name also appears as Marek in payment documents and the conciliation order generated by the Division of Taxation.

commenced on October 22, 2001<sup>2</sup> the date petitioners' time to serve a response to the Division's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

### ***ISSUE***

Whether petitioners filed a timely petition with the Division of Tax Appeals following issuance of a Conciliation Order.

### ***FINDINGS OF FACT***

1. Petitioners, Mark and Anna Ruszczynski, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") seeking review of a Notice of Deficiency notice number L-016102239.<sup>3</sup>

2. Following a conference held on November 30, 1999, the conciliation conferee issued a Conciliation Order (CMS No. 175833), dated August 11, 2000, which recomputed tax in the amount of \$3,365.48, plus penalty and interest at the applicable rate, for the year 1995 and canceled the assessment for the year 1996.

3. Petitioners filed a petition with the Division of Tax Appeals dated June 14, 2001 by United States Postal Service ("USPS") First Class Certified Mail. The USPS postage-paid stamp is dated June 18, 2001. The petition received by the Division of Tax Appeals on June 20, 2001 lists petitioners as Mark and Anna Ruszczynski, 34 Hillside Ave., APT 2AA, New York, New York 10040, and references Notice/Assessment number L-016102239-7. Although petitioners

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<sup>2</sup> The 30 days allowed for petitioners' response to the Division's motion expired on Sunday October 21, 2001. Therefore, petitioners' response was due by October 22, 2001.

<sup>3</sup> The notice is not in evidence. However, the only issue in the present matter is the timeliness of the petition filed with the Division of Tax Appeals making the conciliation order issued by BCMS the relevant statutory document.

checked the box in paragraph 7 of the petition which states that a conciliation conference in BCMS was requested, they did not fill in the date on which the conciliation order was issued. Nor did they attach a copy of the conciliation order. Rather, their handwritten claim that the conciliation order was not received and that the conciliation conference process was interrupted appears in paragraph 7 of the petition.

4. In response to the petition, the Division of Taxation (“Division”) filed an answer dated August 30, 2001. The Division’s answer asserts, *inter alia*, that the Division of Tax Appeals lacks jurisdiction to hear the merits of this matter since petitioners failed to file a petition within 90 days of the issuance of the conciliation order by BCMS. On September 21, 2001, the Division brought the subject motion on the same basis set forth in its answer, to wit, that since petitioners did not file a petition with the Division of Tax Appeals in a timely manner, there is no jurisdiction to address the matter.

5. In support of its motion for summary determination, the Division submitted, among other things, its answer to the petition; an affirmation of its representative, Kevin R. Law, Esq.; the affidavits of Carl DeCesare and James Baisley, employees of the Division; a copy of the certified mail record (“CMR”) containing a list of the conciliation orders allegedly issued by the Division on August 11, 2000 (including one issued to petitioners); a copy of the conciliation order; and a copy of petitioners’ petition.

6. The affidavit of Carl DeCesare, Assistant Supervisor of Tax Conferences in BCMS, sets forth the Division’s general procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. Based on information supplied by BCMS, the Data Management Services Unit prepares the conciliation orders and the CMR, which is a listing of taxpayers to whom conciliation orders are sent by

certified mail on a particular day. A certified control number is assigned by an internal computer application which stores a block of certified control numbers and assigns such numbers. The certified control number is printed at the top of the conciliation order cover letter and on the CMR. The Data Management Services Unit forwards the conciliation orders to the conciliation conferee for signature who in turn forwards the order to a clerk in BCMS assigned to process conciliation orders. The Data Management Services Unit forwards the CMR to this same clerk for processing. The clerk, as part of her regular duties, verifies that the names and addresses of taxpayers and the certified control numbers listed on the CMR are the same as those on the conciliation order cover letters and the actual orders. The conciliation orders and the CMR are picked up at BCMS by an employee of the Division's Mail Processing Center.

7. Each page of the CMR is a separate and individual certified mail record for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual CMR for the receiving postal employee to affix his or her signature.

8. The CMR attached to Mr. DeCesare's affidavit consists of six pages. It contains a list of the conciliation orders allegedly issued by the Division on August 11, 2000, including, on page two, an order addressed to petitioners, Marek and Anna Ruszczynski, 34 Hillside Avenue - 2AA, New York, New York 10040-4804. The certified control numbers on the CMR do not run sequentially. All names and addresses listed on the certified mail record have been redacted except the entry for petitioners. The certified control number corresponding to the entry listing petitioners' name and address is certified control number P 811 142 509. Each page of the CMR is date stamped August 11, 2000 by the Colonie Center branch of the USPS in Albany, New

York. A mark, appearing to be either a line or letters, is scrawled through the date stamp on each of the pages of the CMR.<sup>4</sup> Each page contains a space for the signature of a postal service employee verifying receipt of the articles listed on the CMR. There is no entry in the last space at the bottom of each page of the CMR next to “(Name of receiving employee).” At the bottom of page two, the page on which petitioners’ name and certified control number are listed, the number “7” has been filled in as the “Total Number of Pieces listed by Sender.” There are seven articles of mail listed on that page. There is also a space for “Total Number of Pieces Received at Post Office.” This space has been left blank on all six pages of the CMR.

9. The Division’s Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed to show the date of mailing. The CMR is kept in BCMS as a permanent record.

10. The affidavit of James Baisley, Chief Mail Processing Clerk in the Division’s Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record. Thereafter, a member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. A postal employee affixes a postmark to the CMR indicating receipt by the post office. In this particular instance, the postal employee affixed a postmark dated August 11, 2000 to the

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<sup>4</sup> The mark is totally illegible on each page of the CMR and is only recognizable by the person who made it.

CMR. As noted previously, the postal employee did not write his or her signature or initials on the CMR and left blank the space next to "Total Number of Pieces Received at Post Office."

Mr. Baisley's affidavit does not provide any basis for his knowledge that "the U.S. Postmark on the mail record is the official acknowledgment by the U.S. Post Office for the pieces of mail recorded on that mail record."

11. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Baisley's staff on the following day after its initial delivery and is then delivered to the originating office (here BCMS). The regular procedures of the Mail Processing Center concerning the mailing of certified mail were followed in the mailing of the piece of certified mail described herein to petitioners on August 11, 2000.

12. When a piece of mail is returned to the Division's Mail Processing Center by the USPS as a result of being deemed "unclaimed" by the USPS, a member of Mr. Baisley's staff delivers the returned piece of mail back to the unit from which it originated (here BCMS). The procedure of the Mail Processing Center, concerning the delivery of returned mail back to the originating unit, was followed in the delivery of the piece of mail, bearing certified mail number P 811 142 509 that was returned by the USPS, back to BCMS.

13. Mr. DeCesare's affidavit also sets forth the regular procedures followed by BCMS when "unclaimed" or undeliverable certified mail is returned to it by the Division's Mail Processing Center. The Division's Mail Processing Center returns an "unclaimed" or undeliverable piece of certified mail to a clerk in BCMS. The clerk prepares to send the "unclaimed" conciliation order and conciliation order cover letter along with the original envelope bearing the certified mail number, postal stamps and notations to the taxpayer by

regular mail. The clerk then makes a notation on the photocopy of the envelope by writing in the CMS number and the date it is remailed. The regular mail is picked up at BCMS by an employee of the Division's Mail Processing Center.

14. Attached to Mr. DeCesare's affidavit as Exhibit "B" is a photocopy of what Mr. DeCesare asserts is the envelope for certified mail number P 811 142 509 which was returned to the Division's Mail Processing Center by the USPS as "unclaimed." The photocopy is of such poor quality that it is impossible to determine the envelope's type or size. What appears to be the Division's envelope style number, "DTF - 998.6 (5/96)," is located in the upper left-hand corner. Beneath the number, but also on the upper left-hand side, the following return address appears: "New York State Department of Taxation and Finance, Bureau of Conciliation and Mediation, W.A. Harriman Campus, Albany, New York 12227, FAX: (518) 485 - 0437."<sup>5</sup> Directly beneath the return address, petitioners' address appears as follows: "Marek & Anna Ruszczynski, 34 Hillside Avenue - 2AA, New York, NY 10040 -4804." A scribbled line runs through petitioners' address. The printed words "Re: CMS" and "NYS &" as well as additional partially obscured letters also appear to the right of petitioners' address. To the right of the return address is what appears to be a window box which has the word "CERTIFIED" directly above the window box and the word "MAIL" directly beneath the window box. The following numbers appear in the window box: "P 911 142 509." The letters "ces" also appear in the lower left corner of this window box.

The post-paid meter stamp bears "BAN, NY," the date "UG 11'00" and U.S. postage of \$1.73.<sup>6</sup> There is a stamped hand and sleeve pointing to the upper left-hand return address. The

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<sup>5</sup> A portion of the return address is not visible.

<sup>6</sup> The post-paid meter stamp is very faint and barely legible. It did not photocopy well.

hand contains “ED O SENDER.”<sup>7</sup> Various reasons for the return of the piece of mail to the sender including “Unclaimed” and “Refused” are stamped directly beneath the hand. A check mark appears next to “Unclaimed.” The words “NAME,” “1<sup>st</sup> Notice” and “2<sup>nd</sup> Notice” and short lines have been stamped in column form beneath the post-paid meter stamp, near the lower right-hand corner of the envelope. Directly above the stamped word “Name” appears the following handwritten, circled notation: “NAIN” and “8/15/20.” “8/22” is handwritten on the line next to “2<sup>nd</sup> Notice.”

The page on which the photocopy of the alleged envelope appears also contains the handwritten notation “#175833 remailed 9/6/00.”

15. Attached to Mr. DeCesare’s affidavit as Exhibit “C” is a copy of the Conciliation Order, CMS No. 175833, which recomputed the tax for the year 1995 and canceled the assessment for the year 1996.

16. The outgoing regular mail of BCMS is picked up by members of Mr. Baisley’s staff on a daily basis and is brought to the Mail Processing Center. In the Mail Processing Center, a member of the staff operates a machine, weighs the mail and places postage on the envelopes.

17. Petitioners did not respond to the Division’s motion.

### ***CONCLUSIONS OF LAW***

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact,

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<sup>7</sup> A portion of the hand has been stamped over the window box containing the certified mail number and is obscured in the photocopy.



and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also*, ***Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (***Moskowitz v. Garlock***, 23 AD2d 943, 259 NYS2d 1003, 1004; *see*, ***Daliendo v. Johnson***, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgment must be used sparingly (***Wanger v. Zeh***, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (***Daliendo v. Johnson, supra***, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (***Glick &***

**Dolleck v. Tri-Pac Export Corp.**, 22 NY2d 439, 293 NYS2d 93, 94; **Gerard v. Inglese**, 11 AD2d 381, 206 NYS2d 879, 881).

B. Petitioners did not respond to the Division's motion for summary determination. Therefore, petitioners are deemed to have conceded the facts as presented in the affidavits submitted by the Division are correct (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). However, in determining a motion for summary determination the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, *supra*, 536 NYS2d at 179; *see also, Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458, 461).

C. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 681(b) the conciliation order in this case and the underlying notice of deficiency would be binding upon petitioners unless they filed a timely petition with the Division of Tax Appeals. A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Trans County Construction*, Tax Appeals Tribunal, August 24, 1995; *Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The filing of a petition within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

D. Where a taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales &*

*Serv.*, Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered to the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

E. In the instant matter, the Division submitted the affidavits of Mr. DeCesare and Mr. Baisley and a copy of the CMR containing a list of the conciliation orders allegedly issued by the Division on August 11, 2000 to prove the fact and date of mailing. I find the evidence submitted to be defective in many respects.

The general procedures for producing and mailing conciliation orders set forth in Carl DeCesare's affidavit fails to identify which unit prepares the conciliation order cover letter on which the certified number is placed, and also fails to identify who forwards the conciliation order cover letter to the BCMS clerk to be associated with the corresponding conciliation order. In addition, the affidavits of Messrs. DeCesare and Baisley fail to identify which office's personnel, BCMS or the Mail Processing Center, actually places each conciliation order cover letter and the enclosed conciliation order in an envelope. The affidavits also fail to identify the type of envelope used.

I find the CMR is flawed in that it does not bear any entry made by the USPS to indicate the actual number of pieces received at the post office. Accordingly, the CMR does not give rise to a presumption of regularity inasmuch as the document is not complete. The CMR therefore fails to establish that the item addressed to petitioners was actually mailed to them on August 11,

2000 (*see, Matter of Cal-Al Burrito*, Tax Appeals Tribunal, July 30, 1998). The Baisley affidavit offered by the Division to show its standard mailing procedure states that “[t]he U.S. Postmark on the mail record is the official acknowledgment by the U.S. Post Office for the pieces of mail recorded on that mail record.” This assertion has not been accepted as fact herein because the record contains no evidence of the source of Mr. Baisley’s knowledge for this claim. That is, there is no assertion that the Division requested that the Postal employees affix a postmark as an indication or confirmation that each piece of mail listed on the CMR was received (*compare, Matter of Roland, supra*). At best, the affixation of the postmark only establishes that the CMR was received by the Postal Service on August 11, 2000. However, it does not establish that all pieces of mail listed on the CMR were also received. Additionally, the statement in the Baisley affidavit that the affixation of the postmark is the USPS’s official acknowledgment for pieces of mail recorded on that mail record is inconsistent with numerous past statements of the Division’s mailing policy which required the receiving USPS employee to either circle the total number of pieces received or to write the total number of pieces received in the space provided on the CMR in order to show that the document in question was actually mailed on the claimed date (*see, e.g., Matter of McNamara*, Tax Appeals Tribunal, March 9, 2000; *Matter of Golden Eagle Trading Corp.*, Tax Appeals Tribunal, February 10, 2000; *Matter of Kane*, Tax Appeals Tribunal, February 18, 1999).

F. Where the presumption of official regularity does not arise, the Division may present proof of actual mailing of the notice, including circumstantial evidence (*see, Matter of Snyder*, Tax Appeals Tribunal, December 11, 1997; *see also, Coleman v. Commr.*, 94 TC 82). To prove the actual date of mailing of the document, the Division submitted the affidavits of Messrs. DeCesare and Baisley and a photocopy of the envelope that Mr. DeCesare claims was used by

the Division to mail the conciliation order to petitioners on August 11, 2000. I find the evidence which the Division submitted to be insufficient to prove that a conciliation order was issued to petitioners on August 11, 2000. As noted in Finding of Fact “14,” the photocopy of the envelope is of such poor quality it is impossible to determine the type of envelope that was used. The affidavits of Messrs. DeCesare and Baisley fail to indicate the type of envelope used by the Division when mailing conciliation orders and also fail to explain the extraneous words and letters which appear in the photocopy. The post-paid meter stamp bearing the date is very faint and is barely legible because of the poor quality of the photocopy. There is no cancellation of the post-paid stamp by the USPS. The date on which the envelope was returned to the Division is not part of the record. Mr. DeCesare’s affidavit contains only the vague statement that the BCMS clerk prepares to send the unclaimed conciliation order and conciliation order cover letter along with the original envelope to the taxpayer by regular mail. The DeCesare affidavit fails to identify when, in the process of preparing to send those items to the taxpayer by regular mail, the BCMS clerk photocopied the original envelope. Mr. DeCesare’s affidavit also fails to explain how the BCMS clerk ascertained the CMS number written on the copy of the alleged envelope.

In sum, the Division has failed to prove that it issued a conciliation order to petitioners on August 11, 2000. Where, as here, the Division has failed to prove that it has general mailing procedures and that the procedures were followed, the statutory time limit to file a petition is in effect tolled and the petition will be deemed timely (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995).

G. The motion for summary determination filed by the Division of Taxation for an order dismissing the petition of Mark and Anna Ruszczynski is hereby denied; a hearing on the merits will be scheduled as soon as practicable.

DATED: Troy, New York  
January 17, 2002

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE